SUPREME COURT, U. S.

JUN 13 1968

JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

**October Term, 1968**

No. [redacted] 192

EVELYN WALKER,

*Petitioner,*

v.

THE OHIO RIVER COMPANY, a Corporation.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND APPENDIX

THIS PETITION FILED WITHOUT PREPAYMENT OF COSTS AS PERMITTED SEAWOMAN PURSUANT TO 28 U. S. C. PAR. 1916.

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Pittsburgh, Pennsylvania 15219.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
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IN THE

# Supreme Court of the United States

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**October Term, 1968**

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**No. .....**

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EVELYN WALKER, a Seawoman,
*Petitioner,*

v.

THE OHIO RIVER COMPANY, a Corporation.

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Evelyn Walker, a seawoman, respectfully prays that a writ of certiorari issue in the above captioned case directed to the Supreme Court of Pennsylvania to review that Court's Judgment (App. 15) dated and entered on March 15, 1968.

### Citations to Opinions Below

The opinion of the Supreme Court of Pennsylvania (App. 15) sought to be reviewed herein was accompanied by no opinion, but was entered "on the opinion of Judge

Smart" of the Common Pleas Court and is not as yet reported.

## Jurisdiction

The jurisdiction of this Honorable Court is invoked under 28 U. S. C. A., Section 1257 (3) and Rule 19(a) of this Honorable Court.

The Judgment of the Supreme Court of Pennsylvania (App. 15) sought to be reviewed herein was dated and entered on March 15, 1968. The time for filing this petition for writ of certiorari, therefore, expires on June 13, 1968.

## Statement of Question Involved

Is an adverse judgment in a federal admiralty action for only maintenance and cure, a bar to a civil trespass action pending in a state Common Pleas Court based on the Jones Act and the doctrine of seaworthiness?

Affirmed below.

## Statement of the Case

This seawoman, petitioner, disabled since October, 1962, while admittedly a maid and member of the crew of appellee's Motor Vessel Robert P. Tibolt, has been buffeted about in a stormy sea of litigation since first filing her complaint in the Common Pleas Court of Allegheny County, Pennsylvania in the fall of 1963.

Because her complaint was dismisssed for "*forum non conveniens*" by the Common Pleas Court, she was compelled to file her first appeal to the Pennsylvania Supreme Court at 196 March Term, 1964, where her complaint

was reinstated, and later, reargument denied, 416 Pa. 149, which said records by reference are made part hereof.

While the appeal was pending, and to protect her rights of action, a suit for the same causes was filed in the United States District Court for the Western District of Pennsylvania, at 64-11 in Admiralty. On motion of the appellee, the latter case was transferred to the United States District Court for the Southern District of Ohio at Cincinnati, where, upon the Pennsylvania Supreme Court's decision reinstating the Common Pleas complaint, a motion to dismiss voluntarily was made and allowed. From the order of the Ohio District Court refusing to open its order of dismissal, respondent appealed to the Sixth Circuit Court of Appeals, which on February 20, 1967, affirmed the Ohio District Court at No. 16795 therein.

Because of the urgent need of the appellant for medical care and financial assistance, a separate admiralty action for maintenance and cure was filed in the United States District Court for the Western District of Pennsylvania at 64-5 in Admiralty. After refusing respondent's motion to transfer said case to the Ohio District Court, Hon. Joseph P. Willson, D. J., held a trial limited as to the issues involved, as is set out in his Memorandum and Order refusing transfer, which order is appended hereto at page 33. Judge Willson, holding that "this Court is unable to conclude that the libellant suffered any injury on board respondent's motor vessel Tibolt on October 19, 1962," based on the evidence presented, concluded "that libellant hasn't met her burden of proof" and dismissed the maintenance and cure libel.

On appeal to the Third Circuit Court of Appeals, at 358 F. 2d 733, the dismissal of the maintenance and cure libel was affirmed.

Immediately upon the entry of the judgment of the Third Circuit Court of Appeals as aforesaid, respondent herein moved for summary judgment in the Common Pleas below claiming that the said latter decision is *res judicata* on both causes of action pending in the complaint below. As to the second cause of action set out therein, being one for maintenance and cure, entry of order of dismissal was stipulated to. Thereafter, on January 24, 1967, an order was entered dismissing the Jones Act and unseaworthiness causes, being combined in the first count of the complaint, as barred by *res judicata*. The appeal to the Pennsylvania Supreme Court was filed on February 15, 1967 and an opinion affirming on the opinion of Common Pleas Judge Smart entered March 15, 1968.

## Reasons Relied On for the Allowance of the Writ

**1. The Supreme Court of Pennsylvania and the Common Pleas Court of Allegheny County, Pennsylvania, have, by denying a trial on the federally asserted Jones Act and unseaworthiness causes in petitioner's complaint, misconstrued the nature of said federal rights of a seawoman, and have erroneously equated them with her right to maintenance and cure.**

The right to maintenance and cure and wages is a contractual obligation arising out of the nature of the employment and any claim on this account is independent of any right of action under the Jones Act. A recovery in one proceeding under the Jones Act is not a bar to a subsequent proceeding for maintenance, cure and wages and for indemnity for injuries occasioned by unseaworthiness: *Runyan v. Great Lakes Dredge & Dock Co.*, 1944 A. M. C. 614, 141 F. 2d 396 (C. C. A., 6th). *Cf. Sundberg v. Washington Fish & Oyster Co.*, 1943 A. M. C. 1337, 138 F. 2d 801 (C. C. A., 9th); *Armit v. Loveland*,

1941 A. M. C. 365, 38 F. Supp. 432 (E. D. Pa.); *Brinkman v. Oil Transfer Corporation*, 1945 A. M. C. 925, 185 Misc. 257, 56 N. Y. S. 2d 773 (N. Y. Sup.), aff'd 1950 A. M. C. 341, 300 N. Y. 48, 88 N. E. 2d 817 (N. Y. Ct. App.); *Petressen v. American President Lines*, 1944 A. M. C. 540 (N. Y. City Ct.).

A seaman may sue in a United States Court for maintenance and cure after commencing a Jones Act suit in a state court for injuries, including wages: *Berglann v. The Winona*, 1942 A. M. C. 1315, 46 F. Supp. 483 (D. C. Ore.).

Release and satisfaction of a judgment obtained against a third party tort feasor is no bar to a subsequent recovery against the shipowner for maintenance and cure. *Gaynor v. United States*, 1950 A. M. C. 545 (E. D. Pa.).

Settlement of a suit for negligent injury of a minor seaman and for loss of services suffered by his parents did not preclude recovery in his subsequent action for maintenance, in *Brinkman v. Oil Transfer Corporation*, 1945 A. M. C. 925, 185 Misc. 257, 56 N. Y. S. 2d 773 (N. Y. Sup.).

Recovery in a Jones Act suit was held not to be *res judicata* in a subsequent suit for maintenance and cure in *McKinley v. Carnegie-Illinois Steel Corp.*, 1947 A. M. C. 1754, 69 F. Supp. 893 (W. D. Pa.).

> "The language of the court in Brock v. Standard Oil Company of New Jersey, 1940 A. M. C. 406, 33 F. Supp. 353 (E. D. Pa.), to the effect that there can be no recovery of maintenance and cure since libelant's injury was due to his wilful misconduct 'and since there was no negligence on the part of the respondent' was probably an inadvertence in so far as it implies that proof of negligence may be essential to a cause of action for maintenance and cure. See sec. 253 (Vol. 1, *supra*)." (Benedict Law of Admiralty.)

**2. The judgment of the Supreme and local Courts of Pennsylvania ignore petitioner's right to trial by jury on her negligence and seaworthiness causes, contrary to the decisions of this Honorable Court, and to the established federal law.**

The right to maintenance and cure and the right to recover for negligent injury under the Jones Act are independent and cumulative but may be enforced in one suit; *Garrett v. Moore-McCormack Company*, 1942 A. M. C. 1645, 317 U. S. 239, 87 L. Ed. 239, 63 S. Ct. 246; *Bay State Dredging & Contracting Co. v. Porter*, 1946 A. M. C. 1310, 153 F. 2d 827 C. C. A., 1st); *Schantz v. American Dredging Co.*, 1944 A. M. C. 823, 138 F. 2d 534 (C. C. A., 3d); *Runyan v. Great Lakes Dredge & Dock Co.*, 1944 A. M. C. 614, 141 F. 2d 396 (C. C. A. 6th); *Hern v. Moran Towing & Transportation Co.*, (1943) 138 F. 2d 900 (C. C. A., 2d); *Sundberg v. Washington Fish & Oyster Co.*, 1943 A. M. C. 1337, 138 F. 2d 801 (C. C. A., 9th); *Herring v. Luckenback S. S. Co.*, 1943 A. M. C. 1215, 137 F. 2d 598 (C. C. A., 2d); *Campbell v. American Foreign Steamship Corp.*, 1941 A. M. C. 410, 116 F. 2d 926 (C. C. A., 2d); *Nolan v. General Seafoods Corporation*, 1940 A. M. C. 1412, 112 F. 2d 515 (C. C. A., 1st); *Smith v. United States*, 1946 A. M. C. 1172, 66 F. Supp. 933 (D. C. Md.); *Ching Yew Hong v. United States*, 1946 A. M. C. 97, 65 F. Supp. 40 (E. D. N. Y.); *Schucker v. United States*, 1944 A. M. C. 1192 (S. D. N. Y.); *Lewis v. United States Navigation Company*, 1944 A. M. C. 1241, 57 F. Supp. 652 (S. D. N. Y.); *Baker v. Moore-McCormack Lines*, 1944 A. M. C. 1248, 57 F. Supp. 208 (N. D. Cal.); *Socony Vacuum Oil Co. v. Henson*, 1944 A. M. C. 170 (Tex. Dist. Ct.), reversed on other grounds, 1944 A. M. C. 1323, 183 S. W. 2d 256 (Tex. Civ. App.); *Anderson v. Panama Transport Company*, 1942 A. M. C. 431, 744 (S. D. N. Y.); *Smith v. Nicholson Universal Steamship Company*, 1942 A. M. C. 466, 42 F. Supp. 1001

(W. D. N. Y.); *Miller v. United States*, 1940 A. M. C. 475 (S. D. N. Y.); *Garrett v. Moore-McCormack Co.*, 1944 A. M. C. 242 (Pa. C. P.), reversed on other grounds, 1945 A. M. C. 79, 40 A. 2d 16 (Pa. Sup.); *Petressen v. American President Lines*, 1944 A. M. C. 540 (N. Y. City Ct.).

An action for maintenance and cure has been permitted in the Municipal Court for the City of New York after commencement of a Jones Act suit in the Federal District Court as against the contention that the action in the Municipal Court constituted another action pending covering the same subject matter: *Overton v. United States Lines*, 1940 A. M. C. 136.

The most authoritative work on the law of seamen, is that of Erastus C. Benedict, whose widely known work, The Law of American Admiralty, Vol. 4, Sixth Ed., p. 199, observes: "An injured seaman has three rights: (a) a negligence suit under the Jones Act; (b) an action under the general maritime law for injury due to unseaworthiness of the ship or appliances; (c) a suit for maintenance and cure.

When a Jones Act suit in a State Court had been dismissed, and two years later an admiralty suit was lodged in the Federal Court, the latter court permitted the action to stand, pointing out the essential difference between the three causes of action, in a case affirmed by the Third Circuit Court of Appeals; *Rogosich v. Union D. D. & R. Co.*, 1934 A. M. C. 219, 67 F. 2d 377. In the latter case, the District Court excluded evidence of negligence, which alone had been adjudicated in the Jones Act case.

**Negligence of the defendant has not been adjudicated.**

The sole basis of the Jones Act claim is the negligence of the defendant. In the maintenance and cure admiralty

action, no such issue was presented, and no evidence offered by the plaintiff, especially in view of the restrictive guide lines laid down by the District Court prior to and during trial, as the record will disclose.

Hon. Joseph Wilson, D. J. had, in ruling on the defendant's motion to transfer the federal action, stated of record:

> "If Libellant's statement to her doctor is correct as to the manner in which she received her injuries it is doubtful whether any crew members will give any testimony of probative value. For instance, Edelman's work on Maritime Injury and Death, Vol. 1, page 9, says:
>
> "*Elements of Proof*
>
> 'The seaman to sustain his action (for maintenance and cure), need only show his employment as a seaman (*i.e.*, crew member), his illness or injury occurring, aggravating or manifesting itself while in the ship's service, and the cost of maintaining itself' * * *"
>
> "Negligence of the owner or the crew, or the unseaworthiness of the ship do not enter into a consideration as to the recovery."

Relying upon the guide-lines of this pre-trial order, the testimony was narrowed to the "Elements of Proof", without attempt to corroborate appellant's testimony as to negligence or unseaworthiness.

Since appellant's status as a seawoman and member of the crew of appellee's vessel was admitted, the only elements of proof remaining to be established at the trial below were her "illness or injury, occurring, aggravating or manifesting itself while in the ship's service, and the cost of maintaining herself".

The issue of negligence was thus clearly not before the Federal Court for determination. On this record, could the decision on the maintenance and cure action be *res judicata* here? Obviously, it cannot. *Gedeon v. State Farm Mut.*, 112 P. L. J. 317; *Williams v. Murdoch*, 330 F. 2d 745.

**3. This is a cause of public importance in that the uniformity of the federal maritime law is threatened in the Commonwealth of Pennsylvania by the judgment sought to be reviewed.**

As was recognized by the Second Circuit Court of Appeals in *Arrowsmith v. United Press International*, 320 F. 2d 219, 226, the growing need for uniformity in application of federal policy and doctrine in cases arising under federal law compels a broader assertion of federal authority rather than continued conflict with and concession to state law. That Court declared:

> "We fully concede that the constitutional doctrine announced in Erie RR. v. Tompkins * * * would not prevent Congress or its rule-making delegate from authorizing a district court to assume jurisdiction over a foreign corporation in an ordinary diversity case although the state court would not; and we reaffirm decisions of this Court that have sustained the application of certain Federal Rules of Civil Procedure differing from the rules applied by the State where the court sits."

Where Congress constitutionally assumes jurisdiction of an area of law, and passes a statute, which conflicts with state legislation on the subject, the federal statute preempts the field; and of course, the Federal Rules of Civil Procedure have statutory effect; *United States v. St. Paul Mercury Insurance Company*, 361 F. 2d 838, 839; *Moore's Federal Practice*, 2nd Ed. Vol. 7, ch. 69, par. 69.04; *Rumsey v. George E. Failing Co.*, 10 Cir. 333 F. 2d 960, 962.

## Conclusion

WHEREFORE, it is respectfully prayed that certiorari be granted herein, and the final judgment of the Supreme Court of Pennsylvania reversed.

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412 471 7777.

## APPENDIX

### Copy of Appearance Docket Entries

Commonwealth of Pennsylvania, }
Allegheny County. } ss.:

Among the Records and Proceedings of the Court of Common Pleas in and for the County of Allegheny, and State of Pennsylvania, the following is a true and correct copy of the Appearance Docket Entries at No. 3105 October Term, 1963-A, to-wit:

APPEARANCE DOCKET ENTRY

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EVELYN WALKER,

#3105 vs.

THE OHIO RIVER CO., a Corporation.

---

September 6, 1963, Trespass, complaint and affidavit filed. Returnable October 6, 1963.

September 12, 1963, Notice returned, served defendant September 10, 1963 by handing to William S. Johnson, Traffic Manager in charge with Complaint.

September 30, 1963, Defendants Preliminary Objections, service accepted.

October 7, 1963, Plaintiffs answer to Defendants Preliminary Objections, service accepted.

*Eo die*, Praecipe for Argument List filed.

October 25, 1963, Praecipe for Argument List filed.

March 13, 1964, Upon consideration of the defendants preliminary objections and answer and briefs submitted

by the parties, it is ordered that the Preliminary Objections are sustained and the Complaint is hereby dismissed.

*Eo die,* Opinion filed. Brosky, J.

March 24, 1964, Notice of appeal, service accepted.

*Eo die,* Certiorari from Supreme Court in the appeal of Evelyn Walker, returnable last Monday of September, 1964.

December 17, 1964, Remittitur from Superme Court in appeal of Evelyn Walker, decision rendered, Order of Court revised, and complaint ordered reinstated.

*Eo die,* & Exemplification filed.

March 5, 1965, Notice of Argument on Preliminary Objections of Defendant.

*Eo die,* Notice, motion for Order directing Defendant to file answer to complaint, service accepted.

March 11, 1965, Defendants answer to plaintiffs motion with acceptance of service filed.

September 14, 1965, After oral argument and consideration of briefs, the Preliminary Objections filed by the Defendant be and the same are hereby dismissed, and Defendant directed to file its answer to the Complaint, within 20 days hereof.

*Eo die,* Exceptions noted and bill sealed.

October 4, 1965, Defendants answer, New Matter, service accepted.

October 11, 1965, Answer to new matter, asserted by Defendant, service accepted.

October 15, 1965, Issue #59580.

August 8, 1966, It is ordered that Defendants motion for Summary Judgment, with respect to the First Cause of Action set forth by Plaintiff in the complaint filed herein be and the same is hereby submitted to the next General Argument List.

*Eo die,* Upon consideration of the Defendants' Motion for Summary Judgment, it is ordered that Summary Judgment be and the same is hereby granted on behalf of the Defendant with respect to the Second Cause of action set forth by Plaintiff in the complaint filed herein. Order consented to: August 10, 1966, Defendant's praecipe for General Argument List.

November 22, 1966, Plaintiff statement, accepted.

December 8, 1966, Defendants statement filed.

January 24, 1967, After argument, motion of Defendant for Summary Judgment is granted and it is ordered that the First Cause of action set forth in the Complaint filed, herein is dismissed.

*Eo die,* Exceptions noted and bill sealed. Opinion filed. Smart, J.

January 24, 1967, Motion for Summary Judgment by Defendant and Affidavit of Support.

February 10, 1967, Certiorari to Supreme Court in appeal of Evelyn Walker filed.

February 15, 1967, Notice of appeal and acceptance of service filed.

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Commonwealth of Pennsylvania, }
Allegheny County. } ss.:

I, DAVID B. ROBERTS, Prothonotary of the Court of Common Pleas in and for said County, Certify that the foregoing is a full and correct copy of the Appearance Docket Entries wherein Evelyn Walker, Plaintiff and The Ohio River Company, a Corporation, Defendant; as the same remains of record before the said Court, at No. 3105 of October Term, A. D. 1963-A.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, the 15th day of March, A. D. 1967.

DAVID B. ROBERTS,
*Prothonotary,*

By CATHERINE BELSTERLING,
*Deputy.*

(SEAL)

**Opinion of the Court**

(Filed: March 15, 1968.)

(J51)

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 122 March Term, 1967.

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EVELYN WALKER,

*Appellant,*

v.

THE OHIO RIVER COMPANY, a Corporation,

*Appellee.*

---

Appeal from the Judgment of the Court of Common Pleas of Allegheny County at No. 3105 October Term, 1963, Granting Appellee's Motion for Summary Judgment and Dismissing Appellant's Complaint.

*Per Curiam.*

Judgment affirmed on the opinion of Judge Smart, as reported in ____ D. & C. 2d. ____ (1967).

Mr. Justice Musmanno dissents.

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**Complaint**

(Filed September 6, 1963.)

Plaintiff, by and through her counsel undersigned, and for her complaint against the defendant states and alleges, upon information and belief:

FOR A FIRST CAUSE OF ACTION:

ONE: That at all times material hereto, the defendant was an Ohio corporation and is regularly doing business and has an office and principal place of business within the jurisdiction of this Honorable Court.

TWO: That at all times material hereto, defendant owned and/or operated, managed, controlled and crewed a towboat motor vessel named Robert P. Tibolt which said vessel is of more than twenty tons burden and duly licensed for and engaged in the business of commerce and navigation upon the Mississippi and Ohio Rivers and like navigable waters.

THREE: That on or about the 19th day of October, 1962, the plaintiff was in the employ of the defendant and assigned by the defendant to the service of said Motor Vessel in the capacity of a seawoman, to-wit, a maid, at a pay scale of $13.00 per day, plus overtime, board, lodging, pay and other reward.

FOUR: That plaintiff, as a seawoman, now brings this action pursuant to the provisions of the Merchant Marine Act, 1920, 46 U. S. Code, Sec. 688, commonly called the Jones Act, and the provisions of the general Maritime Laws of the United States, all of which laws are applicable hereto.

FIVE: That on or about the 18th day of October, 1962, the plaintiff was aboard the said Motor Vessel as a member of its crew and was exercising all due care and caution in and about her own safety while that vessel and her tow was on the Ohio River upbound from Cincinnati, Ohio, plaintiff was peremptorily ordered to do extraordinarily heavy lifting usually performed by a utility man, in addi-

tion to her regular duties, and while lifting a sixty pound mattress was caused to lose her balance and to be injured by the sudden, lurching movement of the vessel, and she then and there sustained the severe and permanent injuries which are herein complained of.

SIX: That her said injuries were not caused by any negligence, fault or want of care on her, plaintiff's part, but were caused wholly and solely by reason of the negligence and carelessness of the defendant, its servants, agents and employees acting within the scope and authority of their employment, who negligently and carelessly:

(a) failed to provide plaintiff with a safe, seaworthy vessel, crew and tow;

(b) failed to provide plaintiff with a safe place and a safe way for her to perform her work as a seawoman assigned to said Motor Vessel;

(c) failed and neglected to order a proper number of available fellow seamen to assist plaintiff in and about a cargo operation where plaintiff's safety required that other crewmen assist her;

(d) peremptorily ordered, permitted and allowed plaintiff to work unassisted and without supervision and direction at unusually heavy duties while the vessel was being navigated;

(e) failed to properly supervise plaintiff at her duties;

(f) failed to warn and apprise plaintiff of her danger;

(g) ordered plaintiff to engage alone in work and utilizing equipment that was not safe or was not handled in a safe and proper manner;

(h) failed to maintain a proper lookout for plaintiff's life and limb while she was employed aboard the towboat and the barge as a seawoman;

(i) failed to equip the towboat with proper and safe equipment and adequate personnel and to maintain the same in a seaworthy condition;

(j) crewed the vessel with officers and other men superior to plaintiff who were not equal in seamanship and safety-awareness to other seamen normally found in those ranks and superior ratings;

(k) operated said motor vessel too fast and carelessly, and the defendant, its servants, agents and employees were otherwise negligent and the towboat was otherwise unseaworthy in the premises.

SEVEN: That as a direct and proximate result of the negligence and carelessness of the defendant, its servants, agents and employees, and as a direct and proximate result of the unseaworthiness of the towboat, as aforesaid, the plaintiff then and there suffered great shock to her entire nervous system, and major injuries to the bones, musculature and other structures of her body, more particularly to the structures of her back, legs and neck, including initial trauma and aggravation to and worsening of body structures which had suffered prior injury but which before this accident had been healed, recovered, repaired, painless and non-disabling, all of which injuries have resulted in permanent residuals; plaintiff has suffered and continues to suffer great pain and physical inpairment; she has been hospitalized and is still under medical care; she has been unable to work and has lost wages and other rewards; she has and will become liable for medical, surgical and nursing expenses, and has been otherwise damaged.

Wherefore, plaintiff demands damages from defendant in a sum in excess of Five Thousand ($5,000.00) Dollars, and trial by jury:

FOR A SECOND CAUSE OF ACTION:

EIGHT: Plaintiff repeats and realleges all the facts set forth in the First Cause of Action with the same force and effect as though pleaded herein in full, omitting all allegations of negligence, unseaworthiness, pain, pain and suffering, loss wages, and diminution of earning capacity and any and all claims other than for amounts needed to maintain and cure herself in and about her care while disabled and unable to work, including both past maintenance and cure and maintenance and care for a reasonable period in the future.

NINE: Plaintiff, as a result of the foregoing, has expended and will expend for a reasonable period of time in the future for her maintenance and cure, while disabled and unable to work, great and considerable sums of money.

WHEREFORE, plaintiff demands trial by jury and judgment against the defendant in each cause of action in a sum in excess of Five Thousand ($5,000.00) Dollars.

S. ELDRIDGE SAMPLINER,
*Attorney for Plaintiff,*
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812 Huron Road,
Cleveland 15, Ohio.

HARRY ALAN SHERMAN,
*Attorney for Plaintiff,*
186 Carlton House,
Pittsburgh 19, Pa.

---

(Affidavit)

**Motion for Summary Judgment by Defendant**

(Filed August 8, 1966.)

Defendant, by its counsel, moves this Honorable Court to enter, pursuant to Rule 1035 of the Pennsylvania Rules of Civil Procedure, a Summary Judgment on behalf of the defendant dismissing the First cause of action allegedly set forth by the plaintiff in the Complaint filed herein. Defendant states that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law on the ground that the First cause of action allegedly set forth by plaintiff herein is barred under the doctrine of *res judicata* and/or collateral estoppel.

In support of this Motion, defendant relies upon the pleadings heretofore filed in this case, including defendant's Answer and New Matter raising the defense of *res judicata* and/or collateral estoppel, plaintiff's Answer to New Matter and also defendant's Supporting Affidavit, which is being filed contemporaneously with this Motion.

WHEREFORE, defendant respectfully requests that this Honorable Court enter a Summary Judgment in its favor dismissing the First cause of action allegedly set forth by plaintiff herein.

ROSE, SCHMIDT AND DIXON,

By ANTHONY J. POLITO,
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**Opinion**

(Filed January 24, 1967.)

SMART, J.

Before: Smart & Wessel, J. J.

On September 6, 1963, plaintiff filed this Complaint against defendant, The Ohio River Company, containing two separate causes of action. The first cause of action is for compensatory damages under the Jones Act and the Admiralty doctrine of seaworthiness. The second cause of action was for maintenance and cure under the general Admiralty law. However, both causes of action were based upon an incident which is described as follows by the plaintiff in paragraph Five of her Complaint:

> "That on or about the 18th day of October, 1962, the plaintiff was aboard the said Motor Vessel as a member of its crew and was exercising all due care and caution in and about her own safety while that vessel and her tow was on the Ohio River upbound from Cincinnati, Ohio, plaintiff was peremptorily ordered to do extraordinarily heavy lifting usually performed by a utility man, in addition to her regular duties, and while lifting a sixty pound mattress was caused to lose her balance and to be injured by the sudden lurching movement of the vessel, and she then and there sustained the severe and permanent injuries which are herein complained of."

On March 17, 1964, plaintiff herein also filed an action against The Ohio River Company in the United States District Court for the Western District of Pennsylvania, at Admiralty No. 64-5, for maintenance and cure based upon the same incident which is the basis of the two causes of action allegedly set forth by plaintiff in the present case.

On February 2, 1965, after a non-jury trial on the merits at Admiralty No. 64-5, the United States District Court for the Western District of Pennsylvania, speaking through his Honor, Judge Joseph P. Willson, filed an Opinion, which expressly embraced and constituted his Findings of Fact and Conclusions of Law and, on the same day, entered an Order directing judgment against the plaintiff herein, Evelyn Walker, and in favor of the defendant herein, The Ohio River Company, and further dismissing the Libel filed at Admiralty No. 64-5. Moreover, on May 5, 1965, Judge Willson filed an Opinion and Order denying plaintiff's Motion to set aside the Judgment and grant plaintiff a new trial. The United States Court of Appeals for the Third Circuit, has, in a *Per Curiam* Opinion, affirmed the Judgment of the District Court at Admiralty No. 64-5.

Plaintiff, in her Answer to defendant's New Matter in this case, has admitted the filing of the aforesaid action for maintenance and cure in Federal Court and has also admitted the entry of Judge Willson's Opinions and Orders dated February 2, 1965 and May 5, 1965.

Defendant herein, in due course, filed an Answer to the Complaint, and also New Matter raising the defense of *res judicata* and/or collateral estoppel. On August 8, 1966, pursuant to defendant's Motion for Summary Judgment, based upon the defense of *res judicata* and/or collateral estoppel, his Honor Judge Loran L. Lewis entered an Order of Court dismissing the second cause of action set forth by plaintiff in the Complaint filed herein. At the same time, Judge Lewis entered an Order submitting defendant's Motion for Summary Judgment, insofar as it related to plaintiff's first cause of action, to the General Argument List. Accordingly, defendant's Motion for Summary Judgment, based upon the aforesaid defenses and a

prior adjudication between the same parties, is presently before this Court for consideration.

The issue before the Court is whether or not the doctrine of collateral estoppel precludes the plaintiff from relitigating in this Court material issues of fact which were actually determined adversely to the plaintiff in a prior suit between the parties involving the same subject matter.

In *Pilgrim Food Products Co. v. Filler Products, Inc.*, 393 Pa. 418, the Court stated as follows:

> "If the parties to an action have had an opportunity to appear and be heard in a prior proceeding involving the same subject matter, *all issues of fact which were actually adjudicated in the former action and essential to the judgment therein are concluded as between the parties even though the causes of action in the two proceedings are not identical.*" Larsen v. Larsen, 392 Pa. 609, 141 A. 2d 353 (1958); Thal v. Krawitz, 365 Pa. 110, 112, 73 A. 2d 376 (1950); Wallace's Estate, 316 Pa. 148, 153, 174 Atl. 397 (1934); Restatement, Judgments § 68 (1942). (Emphasis added.)

The plaintiff's cause of action for maintenance and cure, which has been decided adversely to the plaintiff in the Federal Court action, is not strictly identical with plaintiff's first cause of action herein for damages under the Jones Act and/or the Admiralty doctrine of seaworthiness. However, the subject matter, that is, plaintiff's alleged accident aboard the vessel, Tibolt, on or about October 18, 1962, is the same, and the parties are the same. Accordingly, it would appear clear, under the rule of law set forth by the Court in the *Pilgrim* case, *supra*, that any issues of fact which were actually adjudicated between the parties in the Federal Court action, and essential to the judgment herein, are concluded as between the parties hereto and cannot be relitigated.

In the Federal Court action, the plaintiff testified in detail as to the occurrence of her alleged accident aboard the vessel, Tibolt, which was alleged in the Complaint therein and which is repeated in the Complaint filed in this case. However, after examining all the testimony, Judge Willson, on page 10 of his February 2nd Opinion, stated as follows:

> "*Based upon all the evidence this Court is unable to conclude that libellant suffered any injury on board respondent's motor vessel, Tibolt, on October 19, 1962.* Having seen and heard all the witnesses and having examined and given careful consideration to the other evidence, *the conclusion is reached that libellant has not met her burden of proof.* The preponderance of the evidence favors respondent. The libel will be dismissed and judgment will be entered for the respondent. (Emphasis added)

Plaintiff's claim herein is predicated upon the same shipboard accident which was the basis of plaintiff's claim at Admiralty No. 64.5. In the present case, the plaintiff would have the further obligation of proving that her alleged accident was due to the negligence of defendant and/or the unseaworthiness of the vessel. However, before proceeding to any question of negligence and/or unseaworthiness, plaintiff, in order to recover under the first cause of action set forth in the Complaint herein, would of course, have to prove that the alleged accident which is the basis of her claim did in fact occur. However, plaintiff herein has already had her day in Court with respect to that issue of fact and, under the doctrine of collateral estoppel, plaintiff is precluded from relitigating that same issue in this Court.

For the reasons set forth, defendant's Motion for Summary Judgment will be granted and the first cause of action set forth in plaintiff's Complaint dismissed.

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## ORDER OF COURT

AND NOW, to-wit, this 24 day of January, 1967, the motion filed by defendant for summary judgment be and the same is hereby granted, and it is ordered that the first cause of action set forth in the complaint filed herein be and the same is hereby dismissed.

BY THE COURT,
/s/ SMART, *J.*

*Eo die,* Exceptions noted and bill sealed.

/s/ WALTER P. SMART. (SEAL)

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**Opinion of Hon. Joseph P. Willson, D. J.**

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
Admiralty No. 64-5.

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EVELYN WALKER,
*Libellant,*

v.

OHIO RIVER COMPANY,
*Respondent.*

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WILLSON, J.

This admiralty case came on before me for trial non jury solely on the issue of maintenance and cure based on an incident that libellant says took place on October 19, 1962,

while she was employed as a maid on board respondent's motor vessel Robert P. Tibolt which was then in navigation on the Ohio River. Libellant's claim is "that she was pulling a mattress cover down when the boat either bumped or lunged * * * and me and the mattress just both went across the side of the bunk." Libellant says that at the time in question she sustained an injury to her back which required rather extensive medical treatment and subsequent hospitalizations.

Respondent denies that libellant received any injury on board the vessel. It strongly resists any award for maintenance and cure on her behalf. It admits however and the evidence shows that through its insurance carrier respondent paid various sums covering libellant's medical and hospital expenses but under a non-occupational group insurance policy. Counsel have filed briefs and suggested findings. At the outset it can be stated that libellant's only evidence of any incident on board the vessel at the time she claims she was hurt comes from herself alone. Because this is so it is important in this case to inquire as to what the burden is which rests on libellant to satisfy the Court that she is entitled to an award.

It is clear under the authorities that libellant's burden is the usual one. She must show by a fair preponderance of the evidence that her illness or injury occurred or manifested itself while in the ship's service. In this respect Edelman's *Maritime Injury and Death*, Vol. 1, page 9, says:

> "The seaman to sustain his action (for maintenance and cure), need only show his employment as a seaman (*i.e.*, crew member), his illness or injury occurring, aggravating or manifesting itself while in the ship's service, and the cost of maintaining himself."

In *Prendi's v. Central Gulf Steamship Company*, 330 F. 2d 893, 896 (4th Cir. 1963), the Circuit Court stated this the rule to be:

"Even though the right of recovery for maintenance and cure is quite broad, the Libellant still bears the burden of alleging and proving facts that bring himself within its scope."

Although libellant claims an injury occurred on October 19, she remained on board the vessel to the 30th of October. During this period of 11 days she did not request medical attention. However, the day after she left the vessel she saw Dr. Greenlee, a general practitioner in Manchester, Ohio, for an examination. In his deposition read at the trial, Dr. Greenlee said that libellant complained of headaches and back pain, but that he hospitalized her for conditions other than her back. During the hospitalization he found no structural abnormality in her back. It is to be noticed in connection with Dr. Greenlee's treatment of libellant that Aetna paid the hospital and medical expenses based on his report. In his report and in his testimony he stated that libellant's sickness or injury did not arise of her employment. (See Respondent's Exhibit A.) Dr. Greenlee released libellant for work as of December 28, 1962. About this time libellant returned to work and remained in respondent's employment for a period of some 18 days on the vessel William L. Zimmerman. However, on January 22, 1963, she was again hospitalized at the suggestion of Dr. Greenlee. The reason for the hospitalization at that time according to Dr. Greenlee was that she was suffering from functional hyper glycemia, chronic back spasm, and chronic bronchitis. Again, Dr. Greenlee indicated to Aetna that her sickness or injury did not arise out of her employment. She was released from the hospital on February 4, 1963. Dr. Greenlee saw her several times during March 1963. During this time her complaints centered around her back. And finally Dr. Greenlee referred his patient to Dr. Charles O. Carothers of Cincinnati, Ohio,

a specialist in orthopedic surgery. Dr. Carothers examined libellant on June 21, 1963, at the Adams County Hospital. He testified:

> "My reading of the X rays at the time was that she had the earliest possible narrowing of the lumbosacral disc interspace, this being the only positive finding present in these films.
>
> "I advised her to remain off work for a period of two months and then to see me."

Dr. Carothers saw libellant again on August 2nd at which time her history to him was that her back was improved but that she had headaches and eye trouble.

He advised her to see him again in three months, but she came to him again on August 23. She was at that time wearing a back brace. In the meantime Dr. Carothers had written a letter to the Ohio Industrial Commission suggesting that the libellant be hospitalized for conservative management of her back. The request was granted and libellant was admitted to Bethesda Hospital in Cincinnati on November 15, 1963, and discharged on the 23rd. Dr. Carothers did a myelogram which showed no defect in the lumbar spine. Dr. Carothers did not see libellant again until May 22, 1964.

In the meantime through January and at various periods until May 1964, libellant was still getting treatment from Dr. Greenlee. During this period of time she was complaining to Dr. Greenlee of numerous disabilities. She complained on January 21, of a muscle spasm in the right leg as well as back pain. She had some swelling and pressure in the precordial area during this period. She had some pain around the right knee and some tenderness in the lumbar area. Dr. Greenlee hospitalized libellant again in May 1964. At that time he placed her right leg in traction.

He indicated that libellant had told him that she had fallen in the bathtub but could not remember whether it occurred before or after October 1962.

Dr. Carothers saw libellant again on September 11, 1964, which was the last time he saw her until just before trial. During the period of treatment by Dr. Greenlee and Dr. Carothers it is clear that libellant suffered various other dispositions many of which the doctors concluded came from the menopausal syndrome. It is fair to say that on September 24, 1964, Dr. Carothers concluded that he could no longer give any medical assistance to libellant. Likewise from Dr. Greenlee's testimony it can be concluded that libellant reached maximum cure about September 24, 1964, even if it be conceded that she was a disability dating from October 19, 1962. It is clear also from the evidence that for two periods in 1963 libellant worked on respondent's vessels. One was from January 4 through January 13 on the vessels Zimmerman and Lucas and the other was from May 22 until June 11 on the vessel Tibolt.

The difficult part of this decision is to determine whether libellant has shown by a fair preponderance of the evidence that she did suffer an injury as claimed on October 19, 1962. In this regard my experience as a trial judge in trying many FELA and Jones Act cases is that crew-members will generally support one another when the issue arises as to whether a brother employee was hurt or whether a report was made of an injury received by one of them. I find this is so even in respect to conductors in charge of trains and captains in charge of vessels. They do not hesitate to confirm an injury or at least the report of an injury because it is no consequence to them one way or another. But in this case a fellow seawoman, Mrs. Ward, who roomed with libellant for 11 days after October 19, 1962, said that libellant never mentioned to her that she

had been hurt in lifting or pushing a mattress. Neither had Mr. Ward observed anything in libellant to indicate that libellant had been hurt. There was no report of any accident or injury in the ship's log. The captain stated that no report was given to him. Finally the mate, Robert Lockhart, was called as respondent's witness. He saw libellant everyday from October 19 to October 30. She did not report an injury or mention any back trouble to him, and he did not observe that she was having back trouble. This witness testified that in the fall of 1962 he visited Ames County Hospital to see his mother and while there found out that libellant was hospitalized. He visited with her. She said nothing about her back, but did say, "I just feel so bad, I don't know where I hurt."

Also, David L. Jarvis, Safety Director for the Ohio River Company, testified that there was no request from libellant to be off for sickness or injury on or about October 30, 1962, either on the log of the vessel or on his records. No written report of an accident, injury, or illness occurring to libellant in October of 1962, has ever been received from libellant as is required by company rules.

An analysis of the testimony as shown in this record leaves one in considerable doubt as to the crucial issue in this case. It is to be emphasized that in this case libellant points to October 19, 1962, as the critical date. It should be mentioned on her behalf that her explanation of the failure of any report to respondent as to an injury is because "they", meaning the Captain, "laugh it off." It seems significant to the Court, however, that after returning to her employment on the several occasions she made no mention of the October 19th incident to responsible management personnel. She was aware during this time that Aetna was paying her bills and that it was doing so under

a non-occupational group insurance agreement. The libellant on the stand gave the impression of possessing considerable intelligence. She understood the source of the monies which paid her hospitalization and medical care. Libellant herself signed the claims made to Aetna Life Insurance Company on December 4, 1962, and on February 19, 1963 (Respondent's Exhibit A). In each instance the claim made by her referred to the doctors reports which in turn stated that the injury or sickness did not arise out of libellant's employment. Thus it appears that before any litigation or dispute arose between libellant and respondent she had indicated that she was not disabled as a result of her employment.

Libellant's previous medical history supports respondent's position. For instance, she was treated with traction at the Southern Hills Hospital, Portsmouth, Ohio, in March of 1951 by Dr. Clyde Everett. Dr. Everett's diagnosis at that time was "* * * acute back strain and a possible ruptured intervertabral disc." Moreover, in late February or early March of 1961, libellant told Eugene Ehlman, Operations Manager of the motor vessel Charles K., Inc., that she could not perform all her duties as cook because she was having difficulty with her back.

Finally respondent's counsel has pointed out variations in libellant's statements to her doctors as to how she was injured. In this connection under direct examination she testified that "the boat either bumped or lunged—anyhow, it made something—and it threw me with the mattress as I was pulling the cover down and me and the mattress just both went across the side of the bunk." However, the history she gave Dr. DeRoy on September 12, 1963, was that "she was pulling a mattress when the boat lurched and she notice a sharp pain in the lower back." But on

March 22, 1963, she told Dr. Carothers that she "was putting a mattress cover on a bed and got sudden pain in her back." Dr. Greenlee's memory on the subject was vague but he thought there was a history of her hurting herself on a boat. However, when she was hospitalized in the Adams County Hospital in May 1964, he thought he could recall "her telling me she had fallen in the bathtub."

Based upon all the evidence this Court is unable to conclude that libellant suffered any injury on board respondent's motor vessel Tibolt on October 19, 1962. Having seen and heard all the witnesses and having examined and given careful consideration to the other evidence, the conclusion is reached that libellant hasn't met her burden of proof. The preponderance of the evidence favors respondent. The libel will be dismissed and judgment will be entered for the respondent.

This opinion embraces and constitutes the Findings of Fact and Conclusions of Law.

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**Order of Hon. Joseph P. Willson, D. J.**

AND NOW, February 2, 1965, for the reasons stated in the foregoing opinion, the Clerk is DIRECTED to enter judgment against the libellant, Evelyn Walker, and in favor of the respondent, The Ohio River Company, and the libel is dismissed.

s/ JOSEPH P. WILLSON,
*United States District Judge.*

cc. Harry Alan Sherman, Esq.
Rose, Houston, Cooper and Schmidt, Esqs.

**Memorandum and Order of Hon. Joseph P. Willson, D. J. Deny Transfer and Limiting Elements of Proof in Admiralty Action**

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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No. 64-5 Admiralty.

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EVELYN WALKER,

*Libelant,*

vs.

THE OHIO RIVER COMPANY,

*Respondent.*

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WILLSON, *J.*

Respondent filed a motion under Section 1404(a), Title 28, U. S. Code, for the convenience of parties and witnesses and in the interest of justice to transfer this action to the United States District Court for the Southern District of Ohio, Western Division, sitting at Cincinnati, Ohio.

In the motion it is averred that the libelant resides in the City of Manchester, Ohio, within the Southern District of Ohio, Western Division. It is averred also that the respondent is a West Virginia corporation with its principal place of business in Cincinnati, and that the action could have been brought by libelant in Cincinnati. It is said also in the motion that the injuries set forth in the libel occurred on the M/V Robert P. Tibolt while that vessel and her tow were on the Ohio River upbound from Cin-

cinnati. More important perhaps it is averred by respondent that some thirteen witnesses, being crew members, if not residing in and about Cincinnati are closer to Cincinnati than Pittsburgh. It is averred also in Paragraph 7 that some seven other crew members are closer to Cincinnati than Pittsburgh. According to respondent, medical witnesses are available in Cincinnati rather than in Pittsburgh.

On the other hand libelant says that the case is solely one for maintenance and cure on the admiralty side of the Court. In libelant's answer she says that although her residence is in Manchester, Ohio, she spends considerable time with her daughter in Pittsburgh. Libelant, according to her counsel and as recited in her answer, is relying on the testimony of Dr. George H. Pfohl of Pittsburgh. A copy of his report is attached to the answer. Dr. Pfohl's report is dated February 12, 1964 and is rather detailed. Dr. Pfohl's report indicates that libelant had informed him as to her injuries:

> "She had lifted a mattress from a built-in bed, and was standing the mattress end to end putting a cover on it. She was placing the mattress back into bed when the boat made a bump and she lurched forward with the mattress and fell over the mattress."

This being an action for maintenance and cure only, it seems that respondent's numerous reasons for transfer are not controlling. If libelant's statement to her doctor is correct as to the manner in which she received her injuries, it is doubtful whether any crew members will give any testimony of probative value. For instance, Edelman's work on *Maritime Injury and Death,* Vol. 1, page 9, says:

*"Elements of Proof*

'The seaman to sustain his action (for maintenance and cure), need only show his employment as a seaman (*i.e.,* crew member), his illness or injury occurring, aggravating or manifesting itself while in the ship's service, and the cost of maintaining himself.' "

"Negligence of the owner or the crew, or the unseaworthiness of the ship do not enter into a consideration as to the recovery."

as that authority indicates negligence and unseaworthiness of the vessel are irrelevant.

Under the circumstances it is believed that respondent's Motion to Transfer should be denied, and it is May 13, 1964 So ORDERED.

s/ JOSEPH P. WILLSON,
*United States District Judge.*

cc:
Harry Alan Sherman, Esq.
Rose, Houston, Cooper & Schmidt, Esqs.

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**Certificate of Service**

I hereby certify that a true and correct copy of Petitioner's Motion and Petition for Certiorari were served upon Rose, Schmidt & Dixon, attorneys for respondent at 9th Floor, Oliver Building, Pittsburgh, Pennsylvania 15222 on the 10th day of April 1968.

HARRY ALAN SHERMAN,
*Attorney-proctor for Appellant.*